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New Evolution Ventures, LLC and
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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

15 OSABEMI-YE ADEDAPOIDLE-TYEHIMBA,
16 individually, and on behalf of all others similarly
situated,

17 Plaintiff,

18 vs.

19 CRUNCH LLC, a Delaware limited liability
20 company; NEW EVOLUTION VENTURES,
LLC, a Delaware limited liability company; and
21 NEW EVOLUTION FITNESS COMPANY,
LCC, a Delaware limited liability company; and
22 DOES 1-100, inclusive,

23 Defendants.
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CASE NO. CV 13-00225 WHO

The Honorable William H. Orrick

**DEFENDANT CRUNCH LLC'S UPDATE
TO CASE MANAGEMENT STATEMENT
IN LIGHT OF APPROVAL OF
SETTLEMENT IN *ROTHBERG***

Date: September 17, 2013

Time: 2:00 p.m.

Ctrm: 2

CASE MANAGEMENT STATEMENT

Defendant Crunch LLC submits this update to the parties' Case Management Statement [Docket 55] filed pursuant to this Court's June 27, 2013 Order.

(A) Status of this Federal Action.

This action was filed on January 16, 2013, but was not served. [Docket 1.] On February 7, 2013, a "First Amended Complaint" was filed. [Docket 12.] This First Amended Complaint was served on Defendants on February 15, 2013, which was three days after a settlement was reached in a prior-filed state court action (*Rothberg v. Crunch LLC*, San Francisco Superior Court Case No. CGC-12-519740) alleging the same facts on which Mr. Tyehimba seeks bring this action.

In response to Defendants' Rule 12(b)(6) motion, on May 3, 2013, this Court ruled that Plaintiff had failed to state an FLSA claim as against any of the named defendants, but granted leave to amend to attempt to do so. [Docket 39.]

On the same day, concerning the state law claims, this Court granted Defendant's motion to stay and abstained from all of Plaintiff's the state law claims (premised on supplemental jurisdiction) in favor of the prior-filed *Rothberg* state law action, pursuant to *Colorado River* abstention, and stayed all proceeding on such claims. [Docket 39, at 6:13-25.] Next, on May 14, 2013, the Court also stayed discovery on these FLSA claims "*pending finalization of the settlement pending in a related state court proceeding*" – namely, the prior-filed *Rothberg* action. [Docket 41.]

Next, Plaintiff filed a Second Amended Complaint ("SAC") (Docket 40), and Defendants again challenged it. [Docket 43, 47, 50.] On August 9, 2013, the Court dismissed defendants NEV and NEFC from the pleading, with leave to amend. [Docket 59.] The Court did not set a time limit for Plaintiff amend, if he chose to do so. [*Id.*] Today, September 16, 2013, Plaintiff's counsel informed defense counsel that Plaintiff would not file an amended pleading seeking to state a claims against NEV and NEFC. Also on August 9, 2013, the Court denied Plaintiff's motion to toll the statute of limitations. [*Id.*]

The Court set a further status conference for the September 17, 2013, at which time the parties would report on the *Rothberg* preliminary approval hearing.

1 **(B) The Rothberg Settlement Has Been Approved.**

2 Though originally scheduled for August 21, 2013, the *Rothberg* preliminary approval motion
 3 was rescheduled for September 11, 2013. At the hearing, Superior Court Judge Goldsmith **granted** the
 4 motion in full, over Tyehimba's objections. The Parties (and improper objector Tyehimba) having
 5 briefed the FLSA release issue at length (twice),¹ the Superior Court specifically found that the
 6 settlement in the *Rothberg* action could and would release the FLSA claims made here on the same
 7 primary rights asserted in *Rothberg*. [Exhibit A.] In so doing, the Court repeatedly noted that it very
 8 likely would grant final approval as well stating, for example, that it is "an extremely comprehensive
 9 settlement," and that "[t]his is a heavily litigated case and contentious as well in terms of the history of

10 ¹ See e.g., *Bato v. Laboratory Corporation of America Holdings*, 2011 WL 3353280 (C.D. Cal.
 11 March 4, 2011) (settlement of a state law class action in which a FLSA claim was not pled releases FLA
 12 claims on the same primary right; court "concludes that FLSA claims may be released as part of Rule
 13 23 class action without following the opt-in procedure that would be required had plaintiffs asserted
 14 FLSA claims and sought to certify an FLSA collective action for settlement purposes"); *Klein v. Ryan
 15 Beck Holdings, Inc.*, 2007 WL 2059828, *7 (S.D.N.Y. July 13, 2007) ("a decision rendered on the
 16 [state law] class action claims could have preclusive effect on FLSA claims-amounts to little more than
 17 a quarrel with the doctrine of *res judicata*...no provision of the FLSA bars the application of *res
 18 judicata* when the same party requirement is satisfied, as would be the case when a person allows his
 19 state law claims to be adjudicated in a rule 23 class action."); *Kuncl v. Int'l Bus. Machines Corp.*, 660
 20 F. Supp. 2d 1246, 1254 (N.D. OK. 2009) ("the court finds no basis either in § 216(b) or in the
 21 congressional intent behind the statute to hold that *res judicata* principles do not apply ... allowing Kuncl
 22 to litigate his misclassification claims [] twice would undermine the goals behind class actions and
 23 promote, rather than avoid, repetitious litigation."); "[section] 216(b) [of the FLSA] does not create an
 24 exception to the *res judicata* doctrine."; *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 648-49 (N.D.
 25 Cal. 1978), *aff'd and adopted*, 645 F.2d 699 (9th Cir. 1981) ("a prior valid judgment operates as an
 26 absolute bar to a second suit between the same parties or their privies based on the same cause of action
 27 not only in respect of every matter actually litigated, but also as to every ground of recovery or defense
 28 which might have been presented. ... Furthermore, consideration of a *res judicata* defense is
 appropriate even though the [prior] judgment was based upon a stipulated settlement.... Furthermore,
 restricting the *res judicata* effect of class action settlements would lessen a defendants' incentive to
 settle, which would be unfortunate for reasons recently noted by the Ninth Circuit"); *Villacres v. ABM
 Industries, Inc.*, 189 Cal.App.4th 562, *15-*16 (2010) ("[A] judgment pursuant to a class settlement
 can bar [subsequent] claims based on the allegations underlying the claims in the settled class action.
 This is true even though the precluded claim was not presented, and could not have been presented, in
 the class action itself."); *Gamble v. General Foods Corp.*, 229 Cal.App.3d 893, 898-99 (1991) ("Where,
 as here, an action is filed in a California state court and the defendant claims the suit is barred by a final
 federal judgment, California law will determine the *res judicata* effect of the prior federal judgment on
 the basis of whether the federal and state actions involve the same primary right"; under the primary
 right theory, "[a] single cause of action is based on the harm suffered, rather than the particular legal
 theory asserted or relief sought by the plaintiff.").

1 it, and the background of it. This was an adversarial exercise, and this is exactly the sort of process that
 2 gives comfort, if you will, that the issues are covered. This is not a sweetheart deal.” The Court made
 3 clear that Tyehimba could raise “everything you want at final approval stage, but I’m just telling you
 4 what the Court’s strong impression is.” The court ended by noting that “it appears to me that class
 5 members had vigorous representation. I don’t think it’s a close call at this stage.” [Exhibit B,
 6 Transcript at 13:4, 15:12-17, 18:17-19.]

7 Having so ruled, the *Rothberg* Court also set an extremely short time frame for final approval,
 8 which will be heard by that Court just 10 weeks from now, on December 9, 2013. [Exhibit A.]

9 As such, and for all the reasons underlying this Court’s prior stay rulings, defendant Crunch LLC
 10 requests that the Court continue the stay of this action “pending finalization of the settlement pending in
 11 a related state court proceeding.” [Docket 41 (emphasis added).]²

12 (C) **Apart From the Reasons Previously Articulated By This Court For Staying this Action**
 13 **(Particularly Now That the *Rothberg* Settlement Is Approved) This Action Also Should**
 14 **Remain Stayed To Avoid Additional Improper Attempts By Tyehimba’s Counsel To**
 15 **Interfere With Administration Of The *Rothberg* Class and Settlement.**

16 As discussed above, all class action claims in this action have been stayed since May 3, 2013.
 17 Yet, as we have just learned, Tyehimba’s counsel has been masquerading as class counsel in a flagrant
 18 attempt to disrupt the *Rothberg* class action, and improperly solicit clients. Apart from improperly
 19 lodging “objections” to a *preliminary* approval request on which her client had no standing to object
 20 (and never will, as we all know her client will opt-out of *Rothberg* in favor of his claims made here in
 21 this federal action),³ and apart from lodging those objections with the Superior Court department

22 _____
 23 ² As this Court noted at the last status conference, “if the Court grants [preliminary approval],
 24 then the shape of the case is probably going to change, and you [Plaintiff] are going to have to think
 about how you want to proceed, I would guess, in light of it. [Docket 60, at 18:19-21.]

25 ³ It is at the *final* approval – not preliminary approval – that a court to consider the reaction of the
 26 *entire* class to the proposed settlement, not just one person. *Dunk v. Ford Motor Company*, 48
 27 Cal.App.4th 1794, 1801 (1996); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 240 (2001)
 28 (“among the factors considered by the court in evaluating fairness is... Whether the class members have
 reacted favorably or unfavorably to the proposed settlement.”). Even then, non-party Tyehimba – like
 all putative class members – has no standing to file an opposition to a motion for preliminary approval.
 Indeed, it is only after a person has joined the class that he/she has any standing to object to the class

1 hearing the matter even after her improper objection was rejected at the filing window for lack of
 2 standing,⁴ Tyehimba's counsel has, in effect, been pretending to be Rothberg's counsel and
 3 communicating with the *Rothberg* class.

4 Specifically, at the September 11, 2013 hearing in *Rothberg*, counsel for Rothberg noted that
 5 Tyehimba's counsel has been contacting her client and other class members to solicit participation in
 6 this federal action. Importantly, as no class or collective proceeding has been certified in this federal
 7 action, these efforts are flagrant solicitations of individual plaintiffs as clients (not suggestion to join a
 8 certified action) in violation of well-known ethical restrictions. Moreover, they are interferences with
 9 the state law action, in which these claims are *not* stayed. Upon hearing this, Judge Goldsmith stated
 10 that Tyehimba's counsel's conduct "fosters confusion on the part of class members" and "some people
 11 will not know what – what lawsuit they're in." [Exhibit B, at 23:6-7, 23:23-24.] Judge Goldsmith then
 12 ordered Ms. Gibbs (Tyehimba's counsel) to provide Rothberg's counsel with the materials that she sent
 13 to *Rothberg* putative class members. [Id. at 21:20-21.] Judge Goldsmith further clarified that
 14 Rothberg's counsel, not Tyehimba's counsel, is counsel for the class on the primary rights asserted in
 15 *Rothberg* action (which are repeated in the pleading in this later-filed *Tyehimba* action). [Id. at 23:11-
 16

17 settlement. See *Rebnev v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1136 (1990) (persons who have
 18 not elected to be a part of a class lacked standing to object to settlement of class action); *Chase v.*
 19 *Superior Court*, 210 Cal.App.2d 872, 876 (1962) (where a "law firm was not a party to the action [it]
 20 had no standing to make a motion"); *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 418-
 21 19 (5th Cir.1985) ("An opt out plaintiff is not a party to the class action"); *In re Vitamins Antitrust*
 22 *Litigation*, 215 F.3d 26 (D.C. Cir. 2000) (persons who have not elected to be a part of a class have no
 23 standing to object to a settlement; "their interests are not congruent with the interests of the settling class
 24 that were in play at the time of their motion to intervene"); *In re Drexel Burnham Lambert Group, Inc.*,
 25 130 B.R. 910, 923 & n. 8 (S.D.N.Y.1991) (at final approval, "[o]nly Class members have standing to
 26 object to the Settlement of a class action."); *Marshank v. Superior Court*, 180 Cal.App.2d 602, 605
 (1960) ("It is settled that one who is not a party to a proceeding may not make a motion therein.... It
 would seem to confound the reason of law ... that one not interpleaded as a party, neither for nor against
 whom the court could render any relief or judgment, could *sua sponte*, come into the litigation for any
 purpose.") (citing *Difani v. Riverside County Oil Company*, 201 Cal. 210, 214 (1927)); 4 Alba Conte &
 Herbert B. Newberg, *Newberg On Class Actions* § 13:69 (4th ed. 2002) ("Nonparties to a settlement
 generally do not have standing to object to a settlement of a class action").

27 ⁴ See Exhibit C (email confirming same). We note that Tyehimba's counsel failed to inform
 28 counsel for the Parties that her objections were rejected by the filing window, and that she lodged it with
 the department at which the matter would be heard any way.

* * *

By /s/
Mark D. Kemple
Attorneys for Defendants Crunch LLC,
New Evolution Ventures, LLC and New Evolution Fitness,
LLC

Exhibit A

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 2 Jessica L. Campbell, Esq. (S.B. #280626)
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13 Attorneys for Defendant
 14 CRUNCH LLC

15
 16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 17 FOR THE COUNTY OF SAN FRANCISCO
 18

19 REBECCA ROTHBERG, individually, and
 20 on behalf of all others similarly situated,

21 Plaintiff,

22 vs.

23 CRUNCH LLC and DOES 1-100, inclusive,

24 Defendants.

CASE NO. CGC 12-519740

~~[PROPOSED]~~ ORDER GRANTING
 PRELIMINARY APPROVAL OF CLASS
 ACTION SETTLEMENT AND FOR
 CLASS NOTICE OF SETTLEMENT AND
 FAIRNESS HEARING

Date: August 21, 2013
 Time: 9:30 a.m.
 Dept.: 302

Action Filed: April 4, 2012
 Trial Date: None Set

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 26
 27
 28 **[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
 SETTLEMENT AND CLASS NOTICE OF SETTLEMENT, AND SETTING FAIRNESS
 HEARING**

FILED
 San Francisco County Superior Court

SEP 11 2013

CLERK OF THE COURT

BY: [Signature] Deputy Clerk

1 The Joint Motion for Preliminary Approval of Class Action Settlement ("Joint Motion")
2 filed by Plaintiff Rebecca Rothberg ("Plaintiff") and Defendant Crunch LLC ("Crunch") came
3 regularly for hearing before this Court on August 21, 2013. After consideration of all the papers
4 filed in connection therewith, the arguments of counsel, and all other matters presented to the
5 Court, the Court hereby makes a preliminary finding that the proposed class action settlement is
6 fair, reasonable, adequate and in the best interests of the settlement class. Good cause appearing
7 therefore, the Court **GRANTS** the Joint Motion and **ORDERS** as follows:

8 1. The terms of the settlement agreement reached by Plaintiff and Crunch, as set
9 forth in the Settlement Agreement, are hereby preliminarily approved as being fair, reasonable
10 and adequate to the members of the Settlement Class, subject to further consideration at the final
11 approval hearing after the distribution of the notice to the members of the Settlement Class as
12 provided in paragraph 6 of this Order. The Court notes that class members' release of claims
13 arising under the Fair Labor Standards Act ("FLSA") is a material term of this settlement
14 agreement, and acknowledges that putative class members who do not opt-out of the Rule 23
15 class settlement will be deemed to have released FLSA claims as well as state law claims.

16 2. The following settlement class is preliminarily approved for settlement purposes
17 only, and is referred to herein as the "Settlement Class:" Any and all individuals employed as a
18 personal trainers, group fitness instructors, or Pilates instructors by Crunch in California as
19 hourly, non-exempt employees at any time during the period between April 4, 2008 and [the
20 Preliminary Approval Date].

21 3. The Court appoints Scott Cole & Associates as counsel on behalf of the
22 Settlement Class ("Class Counsel") for purposes of settlement only.

23 4. Plaintiff Rebecca Rothberg is hereby appointed as representative of the Settlement
24 Class ("Class Representative") for purposes of settlement only.

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26 ///

27 ///

28 **[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND CLASS NOTICE OF SETTLEMENT, AND SETTING FAIRNESS
HEARING**

5. The form of "Notice of Class Action Settlement" ("Notice"), and the accompanying "Exclusion or Opt-Out Request Form" ("Exclusion Request Form"), attached respectively as Exhibits 1 and 2 hereto, are hereby approved.

6. The Court authorizes mailing of the Notice and Exclusion Request Form to the Settlement Class Members by first-class United States mail to their last known addresses within fourteen (14) business days of [the Preliminary Approval Date]. Crunch shall provide the Claims Administrator with the information necessary to conduct this mailing as set forth in the Settlement Agreement within seven (7) business days of [the Preliminary Approval Date].

7. A hearing to consider and determine (i) whether the Settlement Agreement should be finally approved, (ii) whether Class Counsel's application for attorneys' fees should be approved, and (iii) whether the application for a Class Representative incentive award should be approved, is hereby set for December 9, 2013 at 10 a.m.

IT IS SO ORDERED.

Dated

9/11/13

Ernest H. Goldsmith
THE HONORABLE MARLA J. MILLER

Respectfully submitted,

DATED: July 23, 2013

SCOTT COLE & ASSOCIATES, APC

By:

Molly A. DeSario
Scott Edward Cole

Molly A. DeSario

Attorneys for Plaintiff Rebecca Rothberg

DATED: July 23, 2013

GREENBERG TRAURIG, LLP

By:

/s/

Mark D. Kemple

Ashley M. Farrell

Attorneys for Defendant Crunch LLC

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS NOTICE OF SETTLEMENT, AND SETTING FAIRNESS HEARING

EXHIBIT 1

According to Crunch LLC ("Crunch") records: (1) you were employed by Crunch LLC ("Crunch") in California as an hourly (exempt) personal trainer, group fitness instructor, or Pilates instructor at any time from April 4, 2008 through [date of preliminary approval] (the "Class Period"); (2) you taught or conducted a total of ____ group fitness classes and/or individual personal training sessions while employed by Crunch during the Class Period. Accordingly, your estimated individual settlement amount from the settlement described below is \$ _____.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

REBECCA ROTHBERG, individually, and on behalf of all
others similarly situated,

vs.

CRUNCH LLC and DOES 1-100, inclusive.

CASE NO. CGC 12-519740

**NOTICE OF CLASS ACTION
SETTLEMENT**

The Superior Court of the State of California for the County of San Francisco ("the Court") authorized this Notice of Class Action Settlement ("Notice"). This is not a solicitation from a lawyer. The Court has given preliminary approval to a settlement of this lawsuit. If you were employed by Crunch LLC ("Crunch") in California at any time from April 4, 2008 through [date of preliminary approval], you should read this Notice carefully because it will affect your rights.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
Do NOTHING	Receive a payment. Release certain claims under state law and federal law, including Fair Labor Standards Act ("FLSA") claims currently pending before the United States District Court of California, Northern District in <i>Tyehimba v. Crunch</i> (Case No. CV-13-00225).
EXCLUDE YOURSELF	Submit a request for exclusion (also called an "opt out" request) to exclude yourself from the lawsuit, receive no money and do not release the claims alleged in this case. If you wish to be excluded from this settlement, please follow the instruction on the enclosed Exclusion or Opt Out Request Form ("Exclusion Request Form").
OBJECT	Submit a written objection to the Court. If you disagree with the proposed settlement, you may submit an objection. If the Court agrees with your objection, the parties can choose whether to withdraw the settlement or change its terms. If the Court rejects your objection, you will still be entitled to participate in the settlement unless you have excluded yourself.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement. In order to speak at the hearing, however, you also must timely submit a written objection.

- These rights and options—and the deadlines to exercise them—are explained in this Notice.

- The Court in charge of this case still needs to decide whether to finally approve the settlement. Payments will be made if the Court approves the settlement and after appeals (if any) are resolved.

BASIC INFORMATION

1. Why did I receive this Notice?

You received this Notice because Crunch records show that you were employed by Crunch as a non-exempt, personal trainer, group exercise instructor or Pilates instructor employee based in California at any time from April 4, 2008 through [date of preliminary approval] ("Class Period"). This Notice explains that the Court has granted preliminary approval of a proposed settlement of a class action lawsuit that may affect you. You have legal rights and options that you may exercise before the Court decides whether to grant final approval of the proposed settlement.

2. What is this lawsuit about?

In the lawsuit, styled *Rebecca Rothberg v. Crunch LLC.*, Case No. CGC 12-519740) (the "Action"), plaintiff Rebecca Rothberg on behalf of herself and on behalf of all other Crunch non-exempt personal trainer, group exercise instructor or Pilates instructor employees in California has alleged that Crunch (1) failed to provide meal and/or rest breaks; (2) failed to pay premium wages owing for unprovided meal and/or rest breaks; (3) failed to timely pay for work that was "off the clock" but allowed or otherwise permitted by Crunch; (4) failed to pay overtime wages; (5) miscalculated overtime; (6) failed to provide accurate wage statements or otherwise maintain proper time records; (7) failed to timely pay wages upon termination; (8) failed to pay waiting time penalties; (9) failed to reimburse business expenses; (10) required waiver of Labor Code provisions; (11) in any way violated the California Labor Code Private Attorney General Act; (12) engaged in unfair business practices. Plaintiff also sought penalties against Crunch pursuant to PAGA as well as damages, other penalties, interest, and attorneys' fees and costs.

Crunch denies it did anything wrong. Nothing in this Notice, or the Settlement itself, means that Crunch admits wrongdoing.

3. Why is this a class action?

The Parties agreed to treat this case as a class action for purposes of settlement only. In a class action, one or more persons, in this case Rebecca Rothberg ("Class Representative"), file a lawsuit on behalf of people who have similar claims. These people together are called "Settlement Class Members." The company sued (in this case Crunch) is called the Defendant. Settlement Class Members and Defendant are sometimes referred to in this Notice as the "Parties." In this case, the Parties have decided to settle the case. The Court has made a preliminary determination that the proposed settlement appears fair, adequate, and reasonable. The Court will decide whether to finally approve the proposed settlement after the Settlement Class Members are given a chance to exclude themselves from or object to the proposed settlement.

5. Is there any money available now?

No money or benefits are available right now because the Court has not yet decided whether to give final approval to the settlement. If the Court gives final approval to the settlement, then you will automatically be sent your portion of the settlement once the Court's order becomes final unless you exclude yourself, or opt-out, from the settlement.

WHO IS A SETTLEMENT CLASS MEMBER?

6. How do I know if I am a Settlement Class Member?

All current and former non-exempt hourly personal trainer, group exercise instructor and Pilates instructor Crunch employees who were or are employed by Crunch in California at any time from April 4, 2008 through [date of preliminary approval], inclusive, are defined as "Settlement Class Members." All Settlement Class Members who do not timely request to be excluded from the settlement as set forth below will be "Participating Class Members," and the Participating Class Members are sometimes collectively referred to as the "Class."

7. I am still not sure if I am a Settlement Class Member.

If you are still not sure whether you are a Settlement Class Member, you can ask for help. You can call [Name of Claims Administrator, the Claims Administrator, at 1-800-XXX-XXXX]. You will not have to pay the Claims Administrator to answer your questions; they will be paid from the Maximum Payment, in amounts approved by the Court, as described in Questions 8 and 9 below.

THE SETTLEMENT BENEFITS-WHAT YOU RECEIVE

8. What does the settlement provide?

The proposed settlement requires Crunch to pay a Maximum Payment not to exceed One Million Fifty Thousand Dollars (\$1,050,000.00). That amount includes payments for attorneys' fees and costs, an incentive award for the Class Representative, claims administration costs, and a payment to the California Labor and Workforce Development Agency under the PAGA. The amount remaining after these payments is the amount available to distribute to the class ("Net Settlement Amount"), which will be no less than Six Hundred and Forty-Five Thousand Dollars (\$642,500.00). Settlement proceeds will be paid to all Settlement Class Members who do not submit an Exclusion Request Form.

9. What can I get from the settlement?

The amount of your share of the Net Settlement Amount will be calculated on a pro rata basis as follows. Crunch will use its payroll records to calculate the total compensation Crunch paid to each Participating Class member from Crunch during the Class Period for teaching or conducting group fitness classes, Pilates classes and/or personal training sessions. Each Participating Class Member's compensation will then be divided by the total amount of compensation Crunch paid to all Participating Class Members during the Class Period for teaching or conducting group fitness classes, Pilates classes and/or personal training sessions, to create a percentage for each class member. That percentage will then be multiplied by the Net Settlement Amount to determine each Participating Class Member's pro rata recovery under this settlement. Your estimated Individual Settlement Amount is shown at the top of this Notice.

10. Will taxes be withheld from my settlement payment?

Your Individual Settlement Amount will include a wage portion (representing unpaid wages), and a non-wage portion (representing penalties, interest and other consideration). From the wage portion of each Settlement Class Member's Individual Settlement Amount, payroll deductions will be made for state and federal withholding taxes and any other applicable payroll deductions owed by the Settlement Class Member and Crunch as a result of the payment, resulting in a "Net Wage Component." The total of the Net Wage Component and the non-wage portion of the Individual Settlement Amount will be the Settlement Class Member's "Net Payment." The wage portion of the Settlement Class Member's Individual Settlement Amount will be reported to the appropriate taxing authorities on an IRS Form W-2 or analogous form. The non-wage portion of the Settlement Class Member's Individual Settlement Amount will be reported to the appropriate

taxing authorities on an IRS Form 1099 or analogous form. Other than the withholding and reporting requirements specifically set forth above, Settlement Class Members are solely responsible for all taxes due on payments made pursuant to the settlement.

11. If the settlement is approved, when will I receive my settlement payment?

The Court has scheduled a Fairness/Final Approval Hearing on _____, 2013, at ____ a.m. in Department 302 of the Superior Court of the State of California for the County of San Francisco, located at 400 McAllister Street, San Francisco, CA 94102, at which time the Court will determine: (1) whether the proposed settlement should be approved as fair, reasonable and adequate to Participating Class Members; and (2) whether the applications for attorneys' fees, costs, and the Class Representative's incentive award should be approved. If the Court approves the settlement, an Order Granting Final Approval will be entered. It is neither required nor necessary that you attend the Fairness Hearing.

Once the Order Granting Final Approval is signed by the Court, and if there is no appeal of the Court's order, then checks will be mailed out to the Class Members within approximately 90 days. If an appeal is filed, then distributions will be delayed until after final resolution of any appeals.

HOW YOU RECEIVE A PAYMENT

12. How can I receive a payment?

If this Notice was sent to you at your current address, you do not need to do anything further to receive payment. If this Notice was forwarded by the postal service, or if it was otherwise sent to you at an address that is not current, or if you have changed your address, then you should immediately notify the Claims Administrator in writing stating your name and past and current addresses.

The Claims Administrator's address is:

By U.S. Mail:

Crunch Claims Administration
c/o [Claims Administrator]
P.O. Box ____
City, State ZIP

By Commercial Carrier or in person:

Crunch Claims Administration
c/o [Claims Administrator] Street Address
Street Address
City, State, ZIP

Otherwise, you do not need to do anything to receive a payment so long as you do not exclude yourself from the Class.

13. What am I giving up if I stay in the class?

If you do nothing, you will be bound by any judgment entered in this Action and will not be allowed to sue Crunch for any claims occurring between April 4, 2008 and [date of preliminary approval], that arise from, relate to or are based on any and all claims alleged in the Action, including Fair Labor Standards Act ("FLSA") claims currently pending before the United States District Court of California, Northern District in *Tyehimba v. Crunch* (Case No. CV-13-00225), to the extent they are made on the same facts and circumstances at issue in this Action. Doing nothing also means that all of the Court's orders will apply to you and legally bind you. It also means that you will be bound by the following Release:

All Participating Class Members, on behalf of themselves, their successors, assigns, heirs, executors, trustees and administrators, shall fully and finally release and discharge Crunch, its past, present and future, direct and indirect, parents, subsidiaries, divisions, partners and affiliates, including NEFC Crunch LLC, AGT Crunch Acquisition LLC, New Evolution Ventures LLC, Lafayette Holding Company LLC, New Evolution Fitness Company LLC and their respective past and present stockholders, officers, directors, employees, managers,

attorneys and insurers, as well as any other persons or entities who are alleged to have been involved in the conduct alleged, or sought to be alleged, in the Action from any and all claims, demands, rights, liabilities, and/or causes of action of any nature and description whatsoever, known or unknown, in law or in equity, whether concealed or not concealed or hidden, from the beginning of time through the Preliminary Approval Date arising from, related to, or based on the claims asserted by Plaintiff Rebecca Rothberg in any pleading in the Action, including without limitation violations of any state or federal statutes, rules, or regulations, based upon, arising out of, or related to any claims or allegations raised in the Action, including those claims or allegations that Crunch (1) failed to provide meal and/or rest breaks; (2) failed to pay premium wages owing for unprovided meal and/or rest breaks; (3) failed to timely pay for work that was "off the clock" but allowed or otherwise permitted by Crunch; (4) failed to pay overtime wages; (5) miscalculated overtime; (6) failed to provide accurate wage statements or otherwise maintain proper time records; (7) failed to timely pay wages upon termination; (8) failed to pay waiting time penalties; (9) failed to reimburse business expenses; (10) required waiver of Labor Code provisions; (11) in any way violated the California Labor Code Private Attorney General Act; (12) engaged in any unfair business practices alleged in the Action and any of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act which relate to or arise out of, in any way, the facts and circumstances that have been alleged in the Action. Released claims expressly include claims arising under the Fair Labor Standards Act ("FLSA"). Released claims expressly exclude claims for workers' compensation, unemployment, discrimination, retaliation and claims unrelated to any wage and hour violation. These constitute the "Released Claims."

By failing to exclude themselves from the settlement, Participating Class Members expressly waive and relinquish any rights and benefits they have or may have under California Civil Code Section 1542 with respect to the Released Claims. The Participating Class Members agree that Civil Code Section 1542 is expressly waived and relinquished to the fullest extent permitted by law as to the Released Claims. This Release will cover all Settlement Class Members who do not opt out, regardless of whether they make a claim, or are available for delivery or have delivered to them, their payment under the settlement. Section 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

By failing to exclude themselves from the settlement, Participating Class Members acknowledge and agree that all of the claims for wage and hour and payroll practice violations in the Action are disputed, and that the Participating Class Members' Individual Settlement Amounts constitute payment in full of any and all amounts allegedly due to them. In light of the foregoing, Participating Class Members shall be deemed to have acknowledged and agreed that California Labor Code section 206.5 is not applicable to the Parties hereto. That section provides in pertinent part as follows:

An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made.

Your settlement check will include language indicating that, by endorsing the check, you are agreeing to waive or release the Released Claims.

14. What if I get my payment and don't cash it?

If you receive the payment and do not cash your check, you will still be bound by the terms of the settlement and you will release all claims released under this settlement. After 100 days, the Claims Administrator will stop payment on your check.

15. What happens if I do nothing at all?

If you do nothing, you will receive a payment from the settlement and you will be bound by the terms of the settlement. This means that if you do nothing, you may not be able to sue for claims alleged in this case that occurred from April 4, 2008 through [date of preliminary approval], including Fair Labor Standards Act ("FLSA") claims currently pending before the United States District Court of California, Northern District in *Tyehimba v. Crunch* (Case No. CV-13-00225), to the extent they are made on the same facts and circumstances at issue in this Action. You will also be legally bound by all of the Orders the Court makes, and judgments the Court enters in this class action. For further information, you can speak with the attorneys in this case listed in Question 26.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you want to retain the right to pursue claims against Crunch alleged in this case and/or you do not want a payment from this settlement, then you must take certain steps. This is called excluding yourself, and is also referred to as "opting out" of the settlement. **DO NOT EXCLUDE YOURSELF IF YOU WISH TO RECEIVE MONEY FROM THIS SETTLEMENT.**

16. How do I request to be excluded from the settlement?

To exclude yourself from the settlement, you must submit a written statement requesting exclusion from the Class by certified mail, postmarked on or before _____, 2013, or by some other means so that it is actually received by the Claims Administrator on or before _____, 2013. Your written request for exclusion must contain your full name, the last four digits of your Social Security number, your mailing address and your telephone number. You must return your request to:

By U.S. Mail:
Crunch Claims Administration
P.O. Box _____
City, State ZIP _____

By Commercial Carrier or in person:
Crunch Claims Administration
Street Address _____
City, State, ZIP _____

If you wish, you may use the Exclusion Request Form attached to this Notice to opt out of the settlement.

17. If I do not exclude myself, can I sue Crunch for the same claims later?

No. If you do not submit a valid and timely request for exclusion postmarked by _____, 2013 or deliver it by some other method so that it is received by the Claims Administrator no later than _____, 2013, you will be bound by all terms of the settlement and any Final Judgment entered in the Action, if the settlement is approved by the Court. The settlement and Final Judgment will include a full release of claims in this Action, which will prevent you from suing Crunch or any related persons or entities for the claims released by the settlement. If you have a pending lawsuit, speak to your lawyer in that case immediately.

18. If I exclude myself, can I get money from this settlement?

No. If you exclude yourself, you are asking not to be included in the settlement.

THE LAWYERS REPRESENTING YOU

19. Do I have a lawyer in this case?

The Court has approved Scott Cole & Associates as Class Counsel to represent you and all Settlement Class Members. You do not need to hire your own lawyer because Class Counsel is working on your behalf. But, if you want to hire your own lawyer, you may do so at your own expense. For example, you can hire your own legal counsel to appear in Court for you if you want someone other than Class Counsel to speak for you.

20. How will the lawyers and the Class Representative be paid?

The amount of attorney's fees and costs awarded to the Class Counsel will be subject to the Court's discretion. You will not have to pay these fees and expenses separately. Class Counsel will request that the Court approve an award of attorneys' fees in an amount not to exceed Three Hundred and Fifty Thousand Dollars (\$350,000.00), and litigation costs of up to Twenty Thousand Dollars (\$20,000). Class Counsel will also request that the Class Representative receive an additional amount called an "Incentive Award." The amount of the Incentive Award will be subject to the Court's discretion, but in any event, will not exceed Seven Thousand Five Hundred Dollars (\$7,500). This Incentive Award shall be paid out of and deducted from the Maximum Payment. Lastly, as part of the preliminary approval of the settlement, the Court has approved payment of claims administration expenses in the amount of Twenty Thousand Dollars (\$20,000.00) to the Claims Administrator from the Maximum Payment.

OBJECTING TO THE SETTLEMENT

21. How do I object?

If you think that the proposed settlement is unfair, inadequate or unreasonable, you can object to the proposed settlement. If you object, and if the Court approves the proposed settlement, then you will still receive a share of the settlement money, and you will be bound by the terms of the release as set forth in the answers to Questions 13 through 15 above, unless you exclude yourself from the settlement.

If you want to object to any part of the settlement, you must file a written objection with the Court stating with particularity the basis for the objection. If you intend to appear at the Final Fairness and Approval Hearing, whether in person or through counsel, you must include notice of that fact, and state the purpose for your appearance in the written objection. Any notice and/or written objection must be filed with the Court and copies thereof must be mailed or personally delivered to the attorneys listed below no later than _____, 2013.

All objections should be filed with the Clerk of Court no later than _____, 2013 at:

Superior Court of the State of California for the County of San Francisco
400 McAllister Street, Department 302
San Francisco, CA 94102

Copies of all documents filed with the Clerk of Court must be mailed or personally delivered to the following no later than _____, 2013:

Scott Edward Cole
Molly A. DeSario
Jessica L. Campbell
SCOTT COLE & ASSOCIATES, APC
1970 Broadway, Ninth Floor
Oakland, CA 94612

Mark D. Kemple
GREENBERG TRAURIG, LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067

If you object in the manner provided above, then you or your attorney may appear at the Final Approval Hearing, currently set for _____, 2013, at ____ a.m. at Department 302 of the Superior Court of the State of California for the County of San Francisco, located at 400 McAllister Street, San Francisco, CA 94102. However, if you do not object in the manner provided above, your objection may be considered waived and you will not be able to make any other or later objection to the fairness, reasonableness or adequacy of the proposed settlement, the award of attorneys' fees and costs, or Class Representative's Incentive Award.

22. What's the difference between objecting and excluding?

Objecting is simply telling the Court that you don't like something about the settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you do not want to be part of the Class. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FAIRNESS HEARING

The Court will hold a hearing, the Honorable _____ presiding, on _____, 2013, at ____ a.m. at Department 302 of the Superior Court of the State of California for the County of San Francisco, located at 400 McAllister Street, San Francisco, CA 94102, to determine whether the proposed settlement of the Action is fair, adequate, reasonable and should be finally approved by the Court, and whether the Action should be dismissed on the merits with prejudice. At the hearing, Class Counsel will speak on your behalf and answer any questions Judge _____ might have.

23. May I attend the hearing and speak?

Anyone may attend this hearing. If you are a Class Member and wish to speak, you must file and serve an objection as described above before you can speak at the hearing.

GETTING MORE INFORMATION

24. Are there more details about the settlement?

This Notice summarizes the proposed settlement. For a more detailed statement of the matters involved in the Action, you may refer to the Joint Motion for Preliminary Approval of Class Action Settlement, and any other pleadings and papers filed in the Action, which may be inspected at the office of the Clerk of Court located at 400 McAllister Street, San Francisco, CA 94102, during regular business hours of each Court day. Or, you may contact Class Counsel (see contact information in Question 26 below).

25. Can I read a copy of the settlement agreement?

Yes. A copy of the settlement agreement may be found as part of the Joint Motion for Preliminary Approval of Class Action Settlement, which is available for your review at the office of the Clerk of Court at the address provided in Question 24 above, or you may contact Class Counsel (see contact information in Question 26 below).

26. How do I contact Class Counsel to obtain additional information?

All questions regarding this Notice and/or the settlement should be directed to your Class Counsel at:

Scott Edward Cole
Molly A. DeSario
Jessica L. Campbell
SCOTT COLE & ASSOCIATES, APC
1970 Broadway, Ninth Floor
Oakland, CA 94612

**PLEASE DO NOT CONTACT THE CLERK OF THE COURT, THE JUDGE, CRUNCH, OR
CRUNCH'S ATTORNEYS WITH INQUIRIES.**

EXHIBIT 2

Crunch Claims Administration
 c/o [Claims Administrator]
 P.O. Box _____
 City, State ZIP _____

EXCLUSION OR OPT-OUT REQUEST FORM

Claim # _____
 «First» «Last» _____
 «c/o» _____
 «Address 1» «Address 2» _____
 «City», «ST» «Zip» «Country» _____

Rebecca Rothberg v. Crunch LLC and DOES 1-100, Case No. Case No. CGC 12-519740

SUBMIT THIS FORM NOT LATER THAN _____, 2013 ONLY IF YOU WISH TO OPT OUT OF THE SETTLEMENT.

DO NOT SUBMIT THIS EXCLUSION FORM IF YOU WISH TO RECEIVE MONEY FROM THE SETTLEMENT.

I have reviewed the accompanying Notice of Class Action Settlement and understand that any person who worked as a non-exempt personal trainer, group fitness instructor or Pilates instructor employee at Crunch LLC ("Crunch") in California at any time from April 4, 2008 through [date of preliminary approval] is a Class Member in *Rebecca Rothberg v. Crunch LLC and DOES 1-100*, Case No. Case No. CGC 12-519740 (the "Action"). I understand that this settlement is intended to compensate such Class Members.

I understand that I may exclude myself from, or "opt out" of, the class settlement of the Action. I understand that, in any separate lawsuit, including the *Tyehimba v. Crunch* (Case No. CV-13-00225) action currently pending before the United States District Court of California, Northern District, I may receive nothing or less than I would have received if I had participated in the settlement. I understand that any separate lawsuit by me will be undertaken at my own expense and at my own risk, and that there is a deadline to pursue such claims known as the "statute of limitations." I understand that counsel for the class will not represent my interests if I opt out.

I understand that if I do not opt out, I will receive a payment if the class settlement of the Action is approved by the Court. I understand that, by requesting to be excluded from the class settlement, I will receive no money from the settlement in accordance with the Settlement Agreement entered into by Plaintiff and Crunch in the Action. No one has coerced or forced me to opt out; it is my own decision. I opt out of the settlement.

_____		_____	
Printed Name		Signature	
_____		() _____	
Date (mm/dd/yyyy)		Telephone	

Mailing Address			
_____		_____	
City		State	
_____		Zip Code	
____-____-____ (Last Four Digits of Social Security Number)			

THIS FORM MUST BE POSTMARKED BY _____, 2013 OR, IF DELIVERED TO THE CLAIMS ADMINISTRATOR BY MEANS OTHER THAN UNITED STATES CERTIFIED MAIL, RECEIVED BY THE CLAIMS ADMINISTRATOR NOT LATER THAN _____, 2013 AT THE FOLLOWING ADDRESS:

By U.S. Mail:
 Crunch Claims Administration
 c/o [Claims Administrator]
 P.O. Box _____
 City, State ZIP _____

By Commercial Carrier or in person:
 Crunch Claims Administration
 c/o [Claims Administrator] Street Address
 Street Address
 City, State, ZIP _____

YOU SHOULD KEEP A COPY OF THIS DOCUMENT FOR YOUR RECORDS. YOU MAY WISH TO MAIL IT RETURN RECEIPT REQUESTED.

Exhibit B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE ERNEST H. GOLDSMITH, JUDGE
DEPARTMENT 613

---oOo---

REBECCA ROTHBERG,)
individually, and on behalf)
of all others similarly)
situated,)
')
Plaintiff,)

vs.) No. CGC 12-519740

CRUNCH LLC, NEFC Crunch)
and AGT Crunch Acquisition)
Wind Down, LLC and)
DOES 1-100, inclusive,)
Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Wednesday, September 11, 2013

Reported by:
Kenneth Brill, CSR 12797
Job No. 1724132
Pages 1 - 26

Page 1

1 A P P E A R A N C E S:

2

3 For Plaintiff:

4 SCOTT COLE & ASSOCIATES

5 BY: MOLLY DESARIO, ESQUIRE

6 1970 Broadway, Ninth Floor

7 Oakland, CA 94612

8 (510) 891-9800

9 mdesario@scalaw.com

10

11

12 For Defendants

13 GREENBERG TRAURIG

14 BY: MARK D. KEMPLE, ESQUIRE

15 1840 Century Park East

16 Suite 1900

17 Los Angeles, CA 90067

18 (310) 586-7864

19 kemplem@gtlaw.com

20

21

22

23

24

25

1 A P P E A R A N C E S (continued)

2
3 For Osa Tyehimba, Putative Class Member

4 HUNT ORTMANN

5 BY: ALISON GIBBS, ESQUIRE

6 301 North Lake Avenue

7 7th Floor

8 Pasadena, CA 91101

9 (626) 440-5200

10 gibbs@huntortmann.com
11
12
13
14
15
16
17
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1 PROCEEDINGS FOR SEPTEMBER 11, 2013

2 JUDGE ERNEST H. GOLDSMITH PRESIDING, DEPT. 613

3 ---000---

4 10:23 a.m

5 THE COURT: Are the parties here on the Motion
6 for Preliminary Approval of Class Action?

7 MS. DESARIO: Yes, we are.

8 MR. KEMPLE: We are.

9 THE COURT: All right. So you have a
10 reporter.

11 MR. KEMPLE: Yes, Your Honor.

12 THE COURT: Okay. This is action number
13 519740. Rothberg versus Crunch LLC, et al. And would
14 you state your appearances, please.

15 MS. DESARIO: Molly Desario for Plaintiff
16 Rothberg and the putative class.

17 MR. KEMPLE: Good morning, Your Honor, Mark
18 Kemple, I'm appearing on behalf of the defendants.

19 MS. GIBBS: Good morning, Your Honor, Allison
20 Gibbs, appearing on behalf of Osa Tyehimba, the objector
21 putative class member.

22 THE COURT: Well, I have -- I'm familiar with
23 this matter, I've reviewed the papers, and I'm in
24 agreement that it should be approved. What does the
25 objector have to say about it?

Page 4

1 MS. GIBBS: Your Honor, a few issues. As far
2 as preliminary approval of the settlement at this stage,
3 our position is that the release of the claims outside
4 the scope of the operative Complaint, which is the
5 Second Amended Complaint, is improper. And I would say
6 the case on point is Trotsky versus Los Angeles
7 Federal -- Federation Savings & Loan Association. That
8 case dealt with a procedural posture right on point with
9 this case.

10 In particular, there was a class action
11 brought or an action brought against a defendant
12 relating to three provisions involving a trustee,
13 arguing that the provisions were unlawful and were
14 seeking declaratory relief in that regard.

15 During the course of the litigation, one of
16 the provisions was dropped by the plaintiff from the
17 case without opposition from the defendant. Thereafter,
18 a subsequent case action was filed against the same
19 defendant, solely on the basis of that particular
20 provision that was previously dropped, alleging the same
21 thing that it was an illegal provision.

22 And in that case, the defendant went back to
23 the first party who filed and offered settlement. The
24 case ultimately settled and was subject to preliminary
25 approval by the Court. The Court approved the

1 settlement, despite the fact that the -- did not concede
2 that there was any benefit or value considered in
3 exchange for that release, despite the fact that the
4 release was specifically broad enough to include that
5 second provision that had previously been dropped from
6 the case.

7 It went up on appeal and the Court of Appeals
8 reversed the decision finding that the settlement was
9 outside the scope of the Amended Complaint and
10 plaintiffs could not settle the claims of the class of
11 plaintiffs they did not represent.

12 And so the Court cautioned in this particular
13 scenario, when you have a release that's trying to
14 release claims outside the scope of the action currently
15 pending in another litigation, to closely scrutinize
16 that type of settlement in order to determine whether or
17 not the named plaintiffs in the settled case are
18 adequately representing the interests of the class. And
19 the Court had found they had not.

20 And I think that is exactly the scenario at
21 play here. We have several claims. We have -- not the
22 least of which is the FLSA claims that involve not only
23 the claims alleged in the Rothberg action which are
24 limited to off-the-clock claims, but a claim pursuing
25 miscalculation of the regular rate of pay for failure to

1 include bonus, commission pay.

2 That claim does not exist in the Rothberg
3 action. There's been no showing that either party went
4 back and recalculated what the actual rate of pay should
5 have been when including all the remuneration.

6 The only thing that they represented to this Court is
7 that they exchanged information as to the average rate
8 of pay, but that's not the claim at issue. Here we're
9 talking about recalculating the rate of pay.

10 And again, that is a specific claim that
11 they're seeking to release under the FLSA, that claim,
12 if proven to be true, would be entitled to liquidated
13 damages, as the -- our papers reflect, FLSA is pretty
14 clear that you can't waive a plaintiff employee's right
15 to liquidated damages without there being a bona fide
16 dispute, in addition to claims for overtime wages,
17 unless there's been action brought under the FLSA
18 alleging overtime violations.

19 So again, we'd encourage the Court to review
20 Lynn's Food Store case and its progeny that reflect
21 that -- the non-waivable nature of FLSA claims, which
22 include both overtime and liquidated damages.

23 In addition, our position is that -- and,
24 quite frankly, the cases cited by the parties, most of
25 which dealt with res judicata issues, which is not

1 appropriately before this Court, and don't deal with the
2 enforceability of --

3 THE COURT: I know there were objections about
4 that. I mean, it's appropriate -- that issue is
5 appropriately in front of the Court.

6 MS. GIBBS: Well, in the sense that in those
7 cases the Court was analyzing a binding judgment or
8 release in a binding judgment to determine whether or
9 not res judicata applies.

10 And if you review the court -- or the cases
11 noted, the courts in each of those cases actually
12 highlighted the fact that the plaintiff had not objected
13 or opposed or disputed the facts or the releases at
14 issue in the prior filed case at the time that the
15 plaintiff in that case was seeking approval.

16 And I would highlight in particular, aside
17 from the fact that the majority of the cases they cite
18 are out of circuit federal court decisions that are not
19 binding on this Court, they did cite the case of
20 Villacres versus ABM Industries.

21 And I would direct the Court's attention to
22 the court comments in holding that res judicata applied
23 in that case. In particular, I believe I have it as
24 page 582-583 of that decision. The court ultimately
25 held that res judicata applied for the very reason that

1 putative class member objector Osa Tyehimba is opposing
2 the release at this stage, because they noted that
3 Villacres did not raise the unenforceability of the
4 release by including a release of PAGA claims which were
5 not pled in the action through objection, intervention,
6 or by way of appeal or opt out of the class. And that's
7 why the Court held that --

8 THE COURT: Tell me what is that you're
9 seeking.

10 MS. GIBBS: Essentially, and the reason why I
11 noted the Villacres decision is because they -- the
12 court basically said, had they raised this issue at the
13 lower court level, then the court would have had an
14 opportunity to determine if there's a conflict of
15 interest among the named plaintiff and certain class
16 members, and a narrowing of the class may be appropriate
17 in the sense of approving only a narrow class based on
18 the claims actually pled in the action.

19 And so our position is that as to the claims
20 not pled or, you know, at this stage, provided any sort
21 of consideration or conceivable benefit in exchange for
22 the release, which would include the FLSA claim and the
23 miscalculation of the rate of pay, should be carved out
24 of the release, and a narrow class should apply, at
25 least at the preliminary approval stage.

1 We've also reserved the right, you know, at
2 final approval to potentially object to whether or not
3 the -- as to the other claims it's fair and appropriate
4 because at this stage there has been no evidence as to
5 the value that was attached to these claims.

6 MR. KEMPLE: Your Honor, may I?

7 THE COURT: What does the moving party say?

8 MR. KEMPLE: Thank you, Your Honor. First of
9 all, we're at preliminary approval, of course. Whatever
10 objections a class member wants to make are
11 appropriately directed to final approval.

12 In terms of there is no res judicata issue
13 here, of course there is a res judicata issue here.
14 This will be a judgment that will be entered, and the
15 question is: Does it release FLSA claims on exactly the
16 same facts as alleged in the underlying case.

17 Every case to look at that issue has said, of
18 course it does, under basic doctrines of res judicata,
19 that's Klein, Kunkel, Valerio, a Ninth Circuit decision,
20 Villacres, California Court of Appeal, Gamble versus
21 General Foods, California Court of Appeal and Molina,
22 another district court case that we've cited, all of
23 these are in our briefs.

24 Every case to address this issue says of
25 course; otherwise, you would settle these claims and the

1 next day the exact same claims would be brought under
2 federal law.

3 The Primary Right Doctrine says when you
4 settle something on the facts on the transaction at
5 issue, all claims, whether made or not made, are
6 extinguished by that settlement. It's basic law applied
7 specifically in this context to defeat these assertions
8 which at any rate should be made at final approval, not
9 at preliminary approval, when the entire class can weigh
10 in on the issue.

11 The notion that we are somehow settling
12 primary rights outside what is pled in this pleading is
13 defeated at multiple levels. First of all, the
14 settlement on its terms says it is only releasing claims
15 that were offered and advanced in the underlying
16 litigation. Again, a claim is not whether it's labeled
17 federal or state law, it's the transaction in question.

18 As to the specific claims that she tries to
19 isolate -- and again, if there is an objection here,
20 it's for final approval, they are pled. Meal and rest
21 breaks is pled, overtime violations are pled. Indeed,
22 even at the most granular level, failure to calculate
23 the regular rate of pay is referenced in the SAC -- the
24 Second Amended Complaint at paragraph 6.

25 We are not trying to settle anything that was

1 not litigated voraciously, if that's the right --
2 ferociously by plaintiff's counsel in the underlying
3 case.

4 We went to a mediation, prolonged. David
5 Rotman is top of the field. We settled these claims.
6 We exchanged enormous amounts of information as is all
7 documented on all of these claims. There is just
8 nothing unusual here other than Ms. Gibbs and her client
9 are trying to overturn the apple cart so that they can
10 be the party that settles with us. But the fact is the
11 first filed action that's here before this Court is a
12 perfected valid settlement.

13 If Mr. Tyehimba has any objections, he should
14 be heard at final approval. So for that reason, we'd
15 ask the Court for preliminary approval of the
16 settlement.

17 And by the way, there is no argument here that
18 the terms of the settlement are unfair or that the
19 amounts that are being paid are too low, or any of the
20 factors that are to be taken into account at this
21 juncture, those aren't the arguments that are being made
22 by the objector here.

23 So if I could answer any questions, I'd be
24 happy to.

25 THE COURT: I think he's right.

1 MS. GIBBS: Well, I would clarify for the
2 record --

3 THE COURT: Let me just say, I believe this is
4 an extremely comprehensive settlement. I mean, you
5 characterized it as leaving out everything. I haven't
6 seen that at all.

7 MS. GIBBS: Well, that -- based on the -- the
8 motion papers and declarations produced, what is
9 missing -- and this is just to clarify that the position
10 is not that there's been any concession that the
11 settlement's fair, because we wouldn't be able to
12 determine that because the only information that they
13 provide the Court is as to the distribution.

14 There's been no information or evidence as to
15 what the total valuation or assessment of the settlement
16 claims are so then you can start determining whether or
17 not the distribution is fair. So that information has
18 not been presented, and we did note that in our
19 objection papers. And so we are reserving our right to
20 explore that later, potentially.

21 THE COURT: Well, you can explore it later.

22 MS. GIBBS: At final approval there is a
23 standard which requires that the parties, in particular
24 the plaintiffs representing the class, have to produce
25 information to properly assess the value of the claims

1 at issue.

2 So in -- for example, what were the estimates
3 in terms of the off-the-clock time? We don't know what
4 that is. All we know is what they're intending to pay
5 out for those claims. So we don't know if that's fair
6 because we have nothing to measure it against at this --
7 at this particular stage.

8 THE COURT: Well, it was -- it was certainly
9 negotiated.

10 MS. DESARIO: It absolutely was negotiated,
11 Your Honor, and that's exactly why objections are
12 reserved for final approval.

13 THE COURT: Yeah.

14 MS. GIBBS: But at this stage, I'm just
15 clarifying for the record that that information has not
16 been provided and I think defendant's counsel had made
17 some representations that it's not being contested. And
18 I just wanted to clarify for the record that that's not
19 the position of Mr. Tyehimba.

20 And more so, the repeated contention is that
21 we're essentially, or Osa Tyehimba is essentially trying
22 to take the overlapping claims and carve out a specific
23 claim going forward. Since the very --

24 THE COURT: I mean, isn't that the case?

25 MS. GIBBS: As to the unpled and the dropped

1 claims. So the claims that at this stage in the case --
2 so, for example, a miscalculation of the regular rate of
3 pay, it's untrue that there was a fact -- factual
4 predicate for the miscalculation.

5 In every Complaint where you're alleging
6 overtime not being paid at the regular rate of pay in
7 terms of an off-the-clock use, you put in that
8 boilerplate language. But if there is a specific
9 contention that you're arguing that they didn't
10 calculate at the right rate of pay because they failed
11 to include all remuneration, that's a different subset.

12 THE COURT: This is a heavily litigated case
13 and contentious as well in terms of the history of it,
14 the background of it. This was an adversarial exercise,
15 and this is exactly the sort of process that gives
16 comfort, if you will, that the issues are covered. This
17 is not a sweetheart deal.

18 I mean, it's one of the first things that the
19 Court looks at, you know, is this some kind of
20 cooked-together sweetheart deal in the plaintiff case,
21 and I just want to make that observation. And I think
22 that sort of flies in the face of your -- of the thrust
23 of your argument, which is really what you're saying,
24 you're saying that they cooked this up, strongly
25 implying it's a sweetheart deal. And there is nothing

1 to indicate that.

2 In other words, you're saying that, well, they
3 left out all -- all of these factors to the detriment of
4 the class. I don't see any of that. Just the -- the
5 whole issue of this case and looking at the pleadings,
6 nobody got together to shortchange the class as far as I
7 could see.

8 Now, you could raise everything you want at
9 final approval stage, but I'm just telling you what the
10 Court's strong impression is. And it flies in the face
11 of what you're suggesting, because the thrust of what
12 you're suggesting is just what I mentioned.

13 MS. DESARIO: Your Honor, if I could, our firm
14 has litigated a number of these cases against fitness
15 clubs involving this exact issue with the session rate
16 pay to fitness instructors and to personal trainers.
17 Our settlement numbers per work week or per session
18 value are in line with all of those other cases, and
19 that information will be presented to you at final
20 approval.

21 And I will also say that as for the overtime
22 claim that Ms. Gibbs is referring to, under federal law,
23 that is a spread. So in these particular types of cases
24 where you've got people who are teaching classes or
25 doing personal training sessions, where they're not

1 working 40 hours a week, they're working less than that,
2 that spread is calculated out over the hours.

3 So, for example, at Crunch, the instructors
4 are paid a much higher rate than the federal minimum
5 wage standard rate. And so the overtime that Ms. Gibbs
6 is talking about under federal law is going to be a much
7 lower number --

8 THE COURT: Because they work part-time.

9 MS. DESARIO: Pardon?

10 THE COURT: Because they work part-time.

11 MS. DESARIO: Exactly. And so those numbers
12 would actually be much smaller, that recovery would be
13 much smaller under the federal law than would be under
14 California law. And I can assure you that in our
15 pleadings and in negotiations we have advocated the
16 position that all overtime rates should be calculated
17 under California law based on the regular session rate
18 and not some minimum wage rate. So --

19 MS. GIBBS: And I would just clarify that the
20 argument wasn't limited to federal. It applied to the
21 miscalculation of the regular rate of pay claim under
22 both the Labor Code and the FLSA.

23 And again, all remuneration would not just be
24 the session rate, that would include nondiscretionary
25 bonus pay, commission pay, anything else, not just the

1 session rate.

2 THE COURT: You're getting a better deal than
3 they would in federal court.

4 MR. KEMPLE: They are, and we've litigated
5 this.

6 THE COURT: That just speaks so loudly about
7 this case.

8 MS. GIBBS: Well, that, I guess that depends
9 in terms of what claims you're referencing. And again,
10 our position was that the release was overly broad.
11 It's trying to release claims that weren't litigated,
12 weren't pled and, you know, as far as the evidence
13 produced, weren't given any conceivable benefit at this
14 stage in exchange for that release.

15 THE COURT: I think I already stated my
16 observations that this was heavily litigated, and the --
17 it appears to me that the class members had vigorous
18 representation. I don't think it's a close case at this
19 stage, so --

20 MR. KEMPLE: Thank you, Your Honor.

21 THE COURT: So I'm going to approve.

22 MR. KEMPLE: Thank you, we've submitted a
23 Proposed Order. We have an extra copy for the Court.

24 THE COURT: Okay.

25 MR. KEMPLE: I'll approach the clerk with

1 that.

2 THE COURT: Have you shown it to Ms. Gibbs?

3 MS. DESARIO: Your Honor, I have one more
4 request. It's come to our attention that Ms. Gibbs'
5 office has been initiating contact with the putative
6 class members in this case, which are actually now class
7 members under the purview of our firm's leadership.

8 And I'm concerned that, well, for example, our
9 client, in fact, has received a letter from Ms. Gibbs'
10 office which I believe was probably a mass mailing that
11 was sent out to putative class members soliciting
12 participation in her lawsuit, which is currently stayed
13 in her court.

14 And I would ask, first of all, that we receive
15 the communication that was sent out, any and all
16 communications that were sent out to class members, and
17 who they were sent to, so that we can make sure that
18 there is no confusion about what's going on in this
19 other case.

20 And also, of course, to investigate that
21 Ms. Gibbs is not soliciting clients for the purpose of
22 gathering objections to a settlement that we believe is
23 fair for all the class members.

24 THE COURT: So what do you want me to do?

25 MS. DESARIO: I want you to order her to

1 produce the communications that she sent out to the
2 putative class, as well as identify who those recipients
3 were.

4 MS. GIBBS: And just to comment --

5 THE COURT: Any problem with that?

6 MS. GIBBS: Well, initially, this issue was
7 raised last week, a few days ago, we responded to
8 Ms. Desario's request, inviting her to speak more
9 specifically about any communications that she was
10 alleging occurred that were improper. And prior to
11 until this very moment of the Order, there was no
12 verified class, and so there is no attorney-client
13 relationship and --

14 THE COURT: Well, there is now.

15 MS. GIBBS: There is now. However, there has
16 been no mailing that obviously has occurred since this
17 Order because the Order was just issued, and any
18 communications prior to a provisional certification of
19 this class are not -- well, Ms. Desario or her firm does
20 not have a attorney-client relationship with those class
21 members.

22 Going forward, that would be true. And there
23 have been no solicitations. Any potential class members
24 that we've spoken to, we've inquired as to whether or
25 not they are represented by Ms. Desario's firm. That

1 was not provided to us, no information about the
2 representation. Ms. Desario or her firm would have had
3 to have a specific retainer agreement for that to be the
4 case, and our communications were limited to the FLSA
5 claims.

6 MS. DESARIO: Your Honor, first of all, the
7 information that we're getting is that there was a
8 letter. The letter was sent to our client. So I don't
9 know how she got -- I don't know how Ms. Gibbs even got
10 our client's address, she hasn't been provided any
11 discovery in her case, her case is completely stayed,
12 she doesn't have the class list in her case, but somehow
13 she got our client's address and sent our client a
14 letter soliciting participation in her case.

15 To the extent that she says that there are
16 issues -- no issues going forward, I would respectfully
17 disagree. Whatever information was sent out was sent
18 out clearly in the last couple of months while this
19 settlement was pending.

20 THE COURT: Well, just send it to her. Send
21 her a copy of what was sent.

22 MS. GIBBS: If there was, this was news to me,
23 I was not apprised of the fact that there was a
24 letter -- any letter sent to her specific client. If
25 that's the case, I can absolutely produce the letter

1 sent to her client.

2 As to anybody else, she doesn't have an
3 attorney-client relationship with.

4 MS. DESARIO: That's not actually true, Your
5 Honor, we have a number of retainers with a number of
6 the class members that we've spoken to --

7 MR. NORMAN: Which I've invited Ms. Desario to
8 identify to me so that we can address the communications
9 with those individuals; however, I have not been
10 apprised of those -- the nature of that relationship. I
11 would have no knowledge of what -- who she has retainers
12 with.

13 MS. DESARIO: Your Honor, there are two
14 concerns here. First of all, I'm not going to divulge
15 the names of my client at this point to anyone, we have
16 an attorney-client privilege.

17 The first issue is confusion to the class
18 members. So there are communications being sent out
19 about this other case in the midst of the settlement
20 they are about to receive now, a notice package, about
21 the settlement in our case. So there's confusion, I
22 think, that will arise from the notice package being
23 sent out shortly after communications about this other
24 case seeking participation. All right. So --

25 THE COURT: I think so too. I think so too.

1 Ms. Gibbs, just send her that material.

2 MS. GIBBS: Well, in relation to -- and I just
3 want to understand the scope of the Court's Order.

4 THE COURT: Well, you've been soliciting
5 people. And they have a right to know, given -- I think
6 that the point is well made that this fosters confusion
7 on the part of class members.

8 MS. GIBBS: I can represent to the Court that
9 the communication was several months ago, prior to any
10 staying issue in our case, and that's completely
11 inaccurate. And again, without having any particular
12 individual represent to us that they have a retainer
13 with Ms. Desario's firm, there is no attorney-client
14 relationship.

15 THE COURT: Well, they have it now.

16 MS. GIBBS: Right now, going forward.

17 THE COURT: Yeah.

18 MS. GIBBS: Correct.

19 THE COURT: I think that there's a -- there's
20 plenty of room for confusion here. I don't see how
21 you're disadvantaged at all.

22 MS. GIBBS: Okay. Sure.

23 THE COURT: Because some people will not know
24 what -- what lawsuit they're in.

25 MS. GIBBS: Well, and that's -- and that's

1 part of the issue.

2 THE COURT: We're not Philadelphia lawyers,
3 and why go through an unnecessary dispute here? It's
4 not going to hurt -- it's not going to disadvantage you,
5 it's not going to prejudice you. Just let's -- let's
6 head off any confusion people might have. Okay. Let me
7 see the Order.

8 MR. KEMPLE: Thank you, Your Honor.

9 THE COURT: Now, this is the one that was in
10 the package?

11 MR. KEMPLE: Yes, Your Honor.

12 MS. DESARIO: Yes.

13 THE COURT: I've reviewed it. I've seen it.
14 We're going to put in a date.

15 MR. KEMPLE: For final approval?

16 THE COURT: Yes.

17 MR. KEMPLE: Your Honor, I would suggest that
18 we set it for -- I would suggest that we set it about
19 three months out, Your Honor. If we've miscalculated as
20 to the deadlines for notice and such and such, we'll
21 just come back to the Court for --

22 THE COURT: To get a new Order.

23 MR. KEMPLE: Get a new Order, but I believe
24 mid-December certainly would be sufficient.

25 THE COURT: Okay.

1 MS. DESARIO: I would say the week of
2 December 9th, if that works for the Court.

3 THE COURT: December 9th.

4 MS. DESARIO: December 9th is great. Thank
5 you, Your Honor. Would that be at 10:00 a.m.?

6 THE COURT: Yes. Thanks, counsel.

7 MR. KEMPLE: Thank you, Your Honor.

8 MS. GIBBS: Thank you, Your Honor.

9 MS. DESARIO: Thank you very much, Your Honor.

1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF SAN FRANCISCO)
4

5 I, KENNETH BRILL, Certified Shorthand Reporter and
6 Temporary official Court Reporter of the Superior Court
7 of the State of California, hereby certify:

8 That the foregoing contains a true, full and
9 Correct transcript of the proceedings given and had in
10 the Within-entitled matter, and was reported by me at
11 the time and place mentioned, and thereafter transcribed
12 by me into longhand typewriting, and that the same is a
13 correct transcript of the proceedings.
14

15 DATED: September 12, 2013
16 San Francisco, California
17

18
19 _____
20 Kenneth Brill, CSR#12797
21
22
23
24
25

[& - cases]

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Exhibit C

Kemple, Mark D. (Shld-LA-LT-Labor-EmpLaw)

From: Kemple, Mark D. (Shld-LA-LT-Labor-EmpLaw)
Sent: Thursday, August 01, 2013 1:12 PM
To: 'Alison Gibbs'; mdesario@scalaw.com
Cc: Farrell, Ashley (Assoc-LA-Labor-EmpLaw)
Subject: Rothberg v. Crunch

Alison, We had intended that a courtesy copy be sent to you when it was first filed. Apparently, in my absence (I was on vacation when this was filed), my secretary failed to do so. I'll fed ex you a copy for delivery tomorrow. I reiterate however, that you and your client, Mr. Tyehimba, are not a party to this action, and therefore have no standing to file briefs in this matter. Nor do you represent any party to this action. If a class were certified in this action, and if your client then chose not to opt-out and thereby became a party (though we all know that he would opt-out), then your client would be a party and in a position to file documents with the Court in this action, at which time he could be heard on an equal footing with all other newly joined class members. None of that has happened. This is presently an action between Ms. Rothberg and my clients only. If a class is certified and your client joins it, only then would he be a party. I note then when last you attempted to file a brief as a non-party in this action, the Clerk rejected it, and refused to accept it. You nonetheless then improperly took that unfiled document to the department scheduled to hear the matter, and lodged that unfiled document with that department, all without notice to us and without advising that Department in which you lodged the document that the document had not been filed. We ask that you do not again engage in such conduct, and reserve all rights should you attempt to do so. Regards, Mark

Mark D. Kemple

Shareholder

Greenberg Traurig, LLP | 1840 Century Park East Suite 1900 | Los Angeles, CA 90067-2121 Tel 310.586.7864 | Fax 310.586.0264 | Cell 949.294.2837 kemplem@gtlaw.com | www.gtlaw.com A 2011 LAW360 EMPLOYMENT GROUP OF THE YEAR

-----Original Message-----

From: Alison Gibbs [<mailto:gibbs@huntortmann.com>]
Sent: Thursday, August 01, 2013 12:52 PM
To: mdesario@scalaw.com; Kemple, Mark D. (Shld-LA-LT-Labor-EmpLaw)
Subject: RE: Rothberg v. Crunch

Molly/Mark:

I have not received any response from either of you regarding my request for a copy of the parties motion for preliminary approval. Molly I tried to follow-up with you telephonically this morning, but was sent to your voicemail. You previously told me that I would be served with the motion. I am not sure why that did not happen.

Nevertheless, due to some backlog at the filing department the motion has not been posted in the system yet so I am unable to get a copy of the motion directly from the Court in time to review it before the opposition deadline next week. Please email me a copy of the motion papers, otherwise, I will be forced to address the issue with the Court.

Thank you,
Alison

Alison C. Gibbs
Associate
Hunt Ortmann Palffy Nieves Darling & Mah, Inc.

301 North Lake Avenue, 7th Floor

Pasadena, CA 91101

phone 949-335-3500 | fax 949-251-5111 | www.huntortmann.com -----Original Message-----

From: Alison Gibbs

Sent: Wednesday, July 31, 2013 12:23 PM

To: mdesario@scalaw.com

Cc: kemplem@gtlaw.com; icampbell@scalaw.com; farrella@gtlaw.com

Subject: Rothberg v. Crunch

Hi Molly:

After the July 9th hearing you indicated that you would serve me with a copy of the renewed motion for preliminary approval of the class action settlement. I noticed that the parties filed their motion on July 24th. I never received a copy of the motion. Can one of you please email it to me. Thank you.

Regards,

Alison Gibbs

Exhibit D

Hunt Ortmann

CALL US TOLL FREE
1-855-222-2298

Welcome to the Crunch Fitness Class Action Website



Tyehimba et al. v. Crunch LLC et al.

Tyehimba et al. v. Crunch LLC et al.,
Case No. CV 13-00225 SI, U.S. District Court,
Northern District of California
(Last Updated On February 25, 2013)

What Is This Class Action About?

On January 16, 2013, Hunt Ortmann Palffy Nieves Darling & Mah ("Hunt Ortmann") filed a class action lawsuit on behalf of hourly paid employees who work or worked at any Crunch fitness and health club in California and throughout the United States from January 16, 2009 through entry of judgment.

Plaintiff is seeking to recover for all hourly-paid club employees' unpaid wages for all hours worked, including overtime pay; pay for failing to provide employees with uninterrupted 30-minute meal periods in the first 5 hours of their shift; pay for failing to authorize/permit employees to take uninterrupted-10 minute rest periods; reimbursement of expenses employees were required to pay in order to carry out their job duties and other related relief under various California wage and hour laws ("California Class Action"). The lawsuit also asserts claims for unpaid overtime wages and liquidated damages under the Fair Labor Standards Act ("FLSA Collective Action").

What Is The Current Status Of The Case?

The lawsuit was filed on January 16, 2013 against Crunch LLC, New Evolution Fitness Company LLC, and New Evolution Ventures LLC ("Defendants"). Defendants have not yet responded to the complaint.

How To Get Involved:

If you are a current or former employee of Crunch and would like to learn more about your potential rights under this lawsuit, please contact Alison Gibbs, Esq. toll at 1-855-222-2298 or by email at gibbs@huntortmann.com. By providing us with your contact information, we can keep you up to date on the status of this case and your potential claims. All inquiries will be kept confidential.

****If you wish to seek recovery under the FLSA collective action, you MUST submit a Consent to Join form and become a plaintiff in the Action. The amount of time you can recover for unpaid wages under the FLSA is 2-3 years from the date this form is filed with the Court. Every day that goes by without this form on file with the Court can substantially affect the amount of your potential claim. If you would like to preserve your claims for unpaid wages under federal law, it is important that you contact us right away at 1.855.222.2298.**

Contact Us:

Name:

Email Address:

Message:

~~dj85ff~~

Enter the code above here :

Can't read the image? click [here](#) to refresh

ALISON C. GIBBS

Direct Dial: (626) 440-5200

E-mail: gibbs@huntortmann.com

3732.029

May 23, 2013

CONFIDENTIAL COMMUNICATION

Re: **Tyehimba et al. v. Crunch LLC, et al.**
USDC Case No. 13CV00225 SI

Dear _____ :

This letter is to advise you that the law firm of Hunt Ortmann Palfy Nieves Darling & Mah, Inc. ("Hunt Ortmann") represents the above-referenced plaintiff in a potential collective action lawsuit against Crunch LLC (and other related entities) to recover current and former hourly employees' unpaid wages. The federal lawsuit was filed on January 16, 2013 in the California Northern District Court in San Francisco, California. The lawsuit was brought on behalf of hourly paid employees who worked at a Crunch Fitness health clubs nationwide at any time from January 16, 2010 to the present time.¹ This lawsuit applies to all fitness trainers and/or instructors, front desk employees, membership sales personnel and similar hourly paid positions, at Crunch fitness clubs throughout the United States at any time after January 16, 2010 up to the present.

The lawsuit seeks to recover employees' minimum wages and overtime wages under the Federal Labor Standards Act ("FLSA") on behalf of all hourly-paid club employees. Plaintiff alleges that Crunch's policies were such that employees were encouraged not to record hours worked on their time records and therefore employees were not paid for this time worked "off-the-clock" which if included in their work time, would have resulted in employees working more than 40 hours per week and thereby entitling them to overtime pay.

Based on our investigation, hourly employees have reported that they were not paid by Defendants for time spent working on session related activities, which includes but is not limited to, time spent "programming" (i.e. creating a member-specific program tailored to meet the

¹ California law requires attorneys to inform prospective clients that this communication may be considered a solicitation for legal services. (See California Rules of Professional Conduct 1-400).

May 23, 2013

Page 2

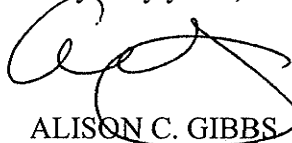
member's health and fitness needs) for Crunch fitness club members; for time spent traveling to training meetings and for time worked before and beyond their scheduled shifts. Our investigation has also revealed that Crunch employees work through meal breaks which was not recorded on their time records and resulted in work in excess of 40 hours a week entitling them to overtime pay. Plaintiff also alleges he and other potential collective members were required by Crunch to attend certification or continuing education programs as a condition of their employment yet they were not compensated for this time nor were they compensated for the costs of maintaining required certifications. In addition, Plaintiff alleges bonus and commission pay were not included in the calculation of overtime pay resulting in an underpayment of compensation. This is just a summary of Plaintiff's allegations. Crunch has denied liability in this matter.

Your Potential Rights Under the Lawsuit:

In order to participate in a collective action seeking recovery under the Federal Labor Standards Act, individual employees, including former employees, must become plaintiffs to the action. **Under federal law, if you wish to participate in this lawsuit and recover any potential monetary damages awarded in this case, you MUST submit a Consent to Join form and become a plaintiff in the lawsuit. Further, the amount of time you can recover for unpaid wages is 2-3 years from the date the Consent to Join is filed with the Court. Therefore, every day that goes by without this document on file with the court can substantially affect the amount of your claim.** Please be further advised that you have the right to seek the advice of an attorney of your own choice.

If you would like to participate in this lawsuit, please sign an return the enclosed Consent to Join and contact information forms to attorney Alison C. Gibbs at 301 North Lake Avenue, 7th Floor, Pasadena, CA 91101-5118. You may also fax the forms to (626) 796-0107 or email them to gibbs@huntortmann.com. If you would like additional information regarding your legal rights and your potential unpaid wages claim or if you know of other employees who would like information, please do not hesitate to contact at Alison C. Gibbs at (855) 222-2298. More information about the case can also be found at www.crunchfitnessclassaction.com. All inquiries are confidential.²

Very truly yours,



ALISON C. GIBBS

² The information you provide will be treated by our firm as confidential. It is unlawful for an employer to retaliate against an employee for their participation in a lawsuit against the employer.